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Supreme Court, U. S.
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October Term, 1973

No. 73 471

E. R. REID, *et al.*, *Petitioners,*

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA UAW, LOCAL UNION 1093,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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IN THE

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vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA UAW, LOCAL UNION 1093,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

The petitioners, E. R. Reid, C. E. Valentine, T. O. Bradshaw, E. Al Bryant, Leet Babb, Jack L. Dawson, W. L. Dilbeck, Henry Gullic, Lawrence E. Kupp, K. C. Lockrie, Nancy B. Michael, Robert D. Newsom, Larry A. Porterfield, Harold F. Reid, Jr., Norma S. Simpson, Kenneth G. Teel, Harlan Thompson and Harold E. Young, respectfully pray that a writ of certiorari issue to review the final judgment and opinion of the U.S. Court of Appeals for the Tenth Circuit entered in this proceeding on May 24, 1973, as well as the interlocutory judgment and opinion entered June 8, 1971.

Opinion Below.

The final opinion of the Court of Appeals is reported in *Reid v. Auto Workers, Local 1093,* 479 F.2d 517 (1973). It affirmed the judgment of the District Court for the Northern District of Oklahoma which issued findings of fact and conclusions of law but no opinion in

Reid v. Auto Workers, Local 1093, 80 LRRM 2886 (1972). An earlier opinion of the District Court in *Reid v. McDonnell Douglas,* 74 LRRM 2762 (1970) was affirmed in part and reversed in part by the Tenth Circuit in *Reid v. McDonnell Douglas,* 443 F. 2d 408 (1971). These several findings, judgments and opinions appear in the appendix hereto.

Jurisdiction.

The final judgment of the Court of Appeals was entered on May 24, 1973. A timely petition for rehearing in banc was denied on June 15, 1973, and this petition for writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

Questions Presented.

1. Is the use for political and ideological purposes of a substantial portion of agency fees exacted over their objection from non-union workers under a collective bargaining agreement executed between an employer and a union pursuant to the National Labor Relations Act, 29 USC 158(a)(3), violative of fundamental political rights of the workers under (1) the First, Fifth, Ninth and Fourteenth Amendments to the Federal Constitution, (2) an implied restriction found in the statute, (3) an implied provision of the collective bargaining agreement, and (4) the union's duty of fair representation?

2. Is governmental action sufficient to invoke constitutional protection present where (1) the agency shop is expressly declared by the NLRA, 29 USC 157 to be "authorized" under 29 USC 158(a)(3), (2) the agency shop is strictly regulated by the latter statute, and (3) where the agency fee requirement is imposed on

non-union workers by an agreement negotiated for them without their consent under the mandatory collective bargaining clauses of the NLRA, 29 USC 158(a)(5), (b)(3), 159 and other statutory provisions by a bargaining representative chosen under the majority rule provisions of the NLRA, including 29 USC 159?

3. Is a non-union worker's right to judicial relief for a breach by a union of its duty of fair representation destroyed by its establishment years later *post litem motam* of a retrospective internal union remedy under which it undertakes to be the judge in its own case?

Constitutional and Statutory Provisions Involved.

Petitioners invoked the protection of their rights under the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

Petitioners invoked the jurisdiction of the District Court under 28 USC 1331, the general jurisdictional statute, 28 USC 1337, providing "the District Court shall have original jurisdiction of any civil action * * * arising under any act of Congress regulating commerce[1] * * *"; and under 29 USC 185(a) providing "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy * * *," and 28 USC 2201, the Declaratory Judgment Act.

Petitioners invoked on the merits the National Labor Relations Act, as amended, 29 USC 157, 158 (a)(3) and (b)(2) and 159(a).

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[1]This was admitted by appellee (IIIR 14, IVR 37-43), and recognized by the District Court (A. 43, IIIR-14).

Respondent invoked Rule 56 of the Federal Rules of Civil Procedure providing for summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

The above constitutional, statutory and rule provisions appear at pages 1-7 of the Appendix.

Statement of the Case.

Petitioners as non-union employees of McDonnell Douglas Corporation at its plant in Tulsa, Oklahoma brought an action in the District Court on November 16, 1967 against the union and the employer [IR 6-16].[2] The complaint alleges that a collective bargaining agreement between the latter two parties contained a clause requiring all employees in the bargaining unit, including petitioners, either to hold membership in the union or to pay an agency fee equal to union dues [IR 8-10]. Petitioners allege that they are not members of the union but are compelled under penalty of discharge to pay agency fees to it against their will and that the union, instead of devoting the money exacted from them entirely to collective bargaining purposes, diverts over their objection a substantial part to supporting political candidates and political and ideological causes opposed by petitioners [IR 10-11].

Petitioners also allege that the exaction and diversion of agency fees, under the authorization of the National Labor Relations Act, 29 USC 158(a)(3) and (b)(2), abridges rights guaranteed to them under the First, Fifth, Ninth and Fourteenth Amendments, deprives them of rights guaranteed under statutes of

[2]The citation is to Volume I, pages 6-16 of the Record. Similar abbreviations will be used hereinafter.

the United States and constitutes an unconscionable breach of the union's fiduciary duty to petitioners [IR 12-13].

Petitioners pray for (1) declaratory judgment that the agency fee agreement denies their constitutional and statutory rights, (2) injunction, and (3) refund or accounting of fees paid [IR 14-15].

The union and the employer filed motions to dismiss. The issues raised in briefs and arguments of the parties prior to the first decision by the Tenth Circuit included all four grounds of union liability raised in this petition, although no express allegation of violation of the collective bargaining agreement had been contained in the complaint.[3]

The District Court sustained the original motion to dismiss (A. 43-49), and petitioners took their first appeal to the Tenth Circuit, which reversed the judgment below as to the union and affirmed as to the employer (A. 34-43). Upon remand to the District Court the union filed a motion for summary judgment [IR 83]. U.S. Magistrate M. L. Bradford ruled that the motion for summary judgment should be denied [IVR 36]. Upon review the District Court reversed the Magistrate, sustaining the motion for summary judgment on two principal grounds (1) petitioners had failed to exhaust internal union remedies, and (2) there was no breach by the union of its duty of fair representation (A. 15-33).

Petitioners appealed to the Tenth Circuit which affirmed the judgment below holding (1) there was no breach of the duty of fair representation; and (2) an internal union remedy filed *post litem motam* providing for a refund of exacted funds spent for political purposes negates an unfair representation charge (A. 8-14).

[3]This is shown by the Record [III R 11-14, IVR 37-43].

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Is in Conflict With Decisions in Two Other Circuits.

The decision of the Tenth Circuit is in conflict with decisions of the Ninth Circuit and the District of Columbia Circuit on the controlling issue whether the use for political purposes of union dues or agency fees exacted from a worker over his objection is contrary to law. The presence here, and the absence in the two other cases of a retrospective internal union remedy established *post litem motam* is not of controlling significance, since the Tenth Circuit expressly stated that its conclusion on other issues "makes it unnecessary to decide whether exhaustion of union remedies is a prerequisite to court action." (A. 14).

2. The Decision Below Is in Conflict With the Decision of the Ninth Circuit.

On the controlling issue in this case the Tenth Circuit refused (A. 12, 36-38) to follow the decision of the Ninth Circuit in *Seay v. McDonnell Douglas,* 427 F. 2d 996 (C A 9, 1970) where the Court having before it a complaint of non-union employees of the same company at a plant in California represented by the International Association of Machinists, making substantially the same allegations and praying for the same relief, as in the case at bar,[4] held under the decisions of this court in *International Machinists v. Street,* 367 U.S. 740 (1961) and *Brotherhood of Railway Clerks v. Allen,* 373 U.S. 113 (1963), that the appellants

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[4]This substantive sameness is observable by comparing the Court's summary of the complaint in *Seay* (427 F. 2d at 998) with the complaint here [IR 6-16].

there had set forth a valid cause of action within the jurisdiction of a District Court for (1) violation of an implied condition of the collective bargaining agreement, (2) breach of the duty of fair representation; as well as either (3) violation of the First and Fifth Amendments, or (4) violation of an implied condition of the statute, 29 USC 158 (a)(3).

3. Decision Below Also Contrary to Decision of the District of Columbia Circuit.

The decision of the Tenth Circuit in *Reid* is also contrary to the very recent decision of the Court of Appeals for the District of Columbia Circuit in *Marker v. Schultz,* 83 LRRM 3026 (1963). Workers in the aerospace industry, covered by the National Labor Relations Act, who are required to pay union dues under compulsory union shop contracts, there brought suit to enjoin Treasury officials from granting tax exemption under the Internal Revenue Code to any labor organization expending tax-free membership dues for partisan political campaigns. The court affirmed the judgment below denying relief. It held that while rights as dissenting union members must be protected by the Courts, their remedies are limited to restitution and to injunction directed against specific union activities under the principles established by this Court in *International Machinists v. Street,* 367 U.S. 740 (1961) and *Brotherhood of Clerks v. Allen,* 373 U.S. 113 (1963), as well as by the Ninth Circuit in *Seay v. McDonnell Douglas,* 427 F. 2d 996 (1970).

4. The Decision Below Conflicts With Controlling Principles Determined in Decisions of This Court.

The decision of the Tenth Circuit is in conflict with controlling principles laid down by this Court in *Street, supra,* 367 U.S. 740, and *Allen, supra,* 373 U.S. 113, both arising under the union shop clause of the Railway Labor Act, 45 USC 152, Eleventh.

In *Street* railroad employees brought an action in a Georgia state court alleging that dues, initiation fees and assessments exacted from them as a condition of employment under an agency shop agreement were used to finance political campaigns and to promote the propaganda of political and ideological doctrines, and concepts with which they disagreed in violation of their rights under the Federal Constitution. The trial court found that the allegations were fully proved and entered a judgment enjoining the enforcement of the union shop agreement, and the Supreme Court of the State affirmed. Upon appeal this Court reversed, holding that the injunction was too broad, but that the employees were entitled to relief. The Court outlined two possible remedies, one by way of injunction against expenditures for political causes opposed by each complaining employee of monies exacted from him and spent for political activities, and the other by way of restitution of that portion of his money which the union expended despite his objection for political causes.

The Court, while holding that the complaint raised constitutional questions of the utmost gravity determined that it was unnecessary to decide them, since the use of the money over objection for political purposes violated the provisions of the union shop clause of 45

USC 152, Eleventh, especially in view of its legislative history. The Court pointed to its previous holding in *Railway Employees Dept. AFL v. Hanson,* 351 U.S. 225 (1956), that in sustaining the union shop clause it sanctioned no more than the requirement for financial support of the collective bargaining agency by all who received the benefits of its work (367 U.S. at 749).

In *Allen* this Court reaffirmed its previous holding in *Street,* at the same time adding a suggestion to the parties there for some voluntary plan by which dissenters would be afforded an internal union remedy. But the question of such a remedy had not been briefed or argued before the Court, nor was it imposed on the parties there, nor stated as a rule of *law or even* as a dictum. The Court reversed and remanded the case, and while reminding the parties of more practical alternatives to litigation, stated that "the courts will not shrink from affording what remedies they may." (373 U.S. at 122-124).

The Tenth Circuit was wrong in holding both in its first decision (A. 36-38) and in its second (A. 12), that differences between the Railway Labor Act under which *Street* and *Allen* were decided preclude the assertion by petitioners of the same grounds of liability by respondents under the National Labor Relations Act. Such differences as exist between the two statutes really impose stronger grounds of liability on respondents, because they lack some of the important elements of public interest found in employment by common carriers, as this Court explained in *Street* (367 U.S. at 755-60). On two vital issues, as we shall see, governmental action and restraints on political spending, there is no difference between the statutes that could relieve respondents of liability.

5. Governmental Action Inhered in Agency Shop Agreement.

The Tenth Circuit was wrong in holding in its decision on the first appeal that the allegation of petitioners of violation of the First, Fifth and Ninth Amendments could not be entertained because there is no governmental action present in a union shop or agency shop agreement under the National Labor Relations Act, 29 USC 158(a)(3), although it recognizes that there is governmental action in the corresponding clause of the Railway Labor Act, 45 USC 152, Eleventh. It ascribes the difference to the fact that the Railway Labor Act strikes down state laws to the contrary while the National Labor Relations Act does not (A. 12, 36-38). But that distinction is not controlling since the union shop clause in each instance both authorizes and strictly regulates the union shop and the agency shop.

Section 7 of the National Labor Relations Act expressly refers to an agreement requiring membership in a labor organization as a condition of employment as "authorized in §8(a)(3)." *Mobil Oil Corp. v. Oil, Chemical & Atomic Workers Union,* 83 LRRM 3046 (CA 5, 1973). The latter section strictly regulates the conditions under which a union shop or agency shop agreement may be made. *Algoma Plywood v. Wisc. Board,* 336 U.S. 301, 314 (1949).

This Court has expressly recognized that §8(a)(3) permits a union shop. *Retail Clerks v. Schermerhorn,* 373 U.S. 746, 751 (1963). The Court there also held that §8(a)(3) authorizes an agency shop as well as a union shop in line with its holding in *NLRB v. General Motors,* 373 U.S. 734 (1963).

This Court in *Railway Employees Dept. AFL v. Hanson*, 351 U.S. 225, 232 (1956), held that the enactment of the federal statute authorizing railroad union shop agreements is governmental action on which the constitution operates though it takes a private agreement to invoke the federal sanction. The Court has held in other cases that governmental authorization of conduct infringing upon the constitutional right of persons involves governmental action. *Reitman v. Mulkey*, 387 U.S. 369, 377, 379 (1967); *McCabe v. Atchison, Topeka & Santa Fe*, 235 U.S. 151, 160-162 (1914); *Civil Rights Cases*, 109 U.S. 3, 11, 17 (1883). The presence of governmental regulation of the subject matter of complaint is sufficient to show the presence of governmental action. *Public Utilities Commission v. Pollak*, 343 U.S. 451, 461-3 (1952); *Smith v. Allright*, 321 U.S. 649, 662-666 (1944).

Under the NLRA the union shop and agency shop are not only authorized and regulated but are made mandatory subjects of collective bargaining where not specifically forbidden by state law—which is true in the majority of states, including Oklahoma. The IAM has been certified as the exclusive representative of all employees in the bargaining unit under §9 of the Act, and the employer is required, under §8(a)(5) and 8(b) in conjunction with §8(a)(3) to bargain collectively with the union on the subject of the agency shop as well as the union shop. *NLRB v. General Motors Corp.*, 373 U.S. 734, 743 (1963). The union is authorized under 29 USC 157 to strike to enforce its demand for legally permissible union objectives such as a union shop or an agency shop. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233-236 (1963). Suits

to enforce such an agreement may be maintained under the express provisions of 29 USC 185, *Smith v. Evening News Assn.*, 371 U.S. 195, 210-214 (1962). Under the NLRA and related statutes Congress has clothed the union as a bargaining representative with powers comparable to those possessed by a legislative body, both to create and restrict the rights of those whom it represents, and its powers are subject to constitutional limitations in the same way as the acts of a legislature. *Steele v. Louisville & Nashville R. R. Co.*, 323 U.S. 192, 198, 202 (1944); *American Communications Ass'n v. Douds*, 339 U.S. 382, 401-402 (1950).

The union shop clause under the current legal framework of the NLRA is thus part of the strictly governmentally created majority-rule principle underlying the whole structure of collective bargaining. A man in a free society has the power to contract for himself, except where the state for some supposedly justifiable reason intervenes to take away the right. Here the federal government has by statute intervened to take away a large part of the right of the worker to contract for his own employment and to transfer it to a representative chosen by a majority of those in the collective bargaining unit. Both the representative and the agreement he makes including any agency shop clause are the product of a positive statutory grant—a clear manifestation of governmental action.

6. Restrictions On Use of Dues and Fees Same Under Both Acts.

The Tenth Circuit is also in error in placing a construction upon the union shop clause of the National Labor Relations Act different from the one placed upon the union shop clause of the Railway Labor Act by this

Court in *Street* and *Allen*, insofar as the limitation on the use of funds collected is concerned. The Ninth Circuit held in *Seay* that "the applicable provisions of the two statutes are for all purposes [in a political spending case] the same" (427 F.2d at 1003), and that they forbid political spending over the objection of the worker (427 F.2d at 1000).

The union shop clause of each of these two statutes contains a proviso to the effect that no agreement shall authorize discharge of a worker for any reason other than the nonpayment of initiation fees and dues. This Court has found that both clauses were enacted pursuant to pleas of union leaders for relief from the practice of "free-riders"—employees who while benefiting from the union's representation in collective bargaining and in the settlement of grievances yet refuse to share in the costs of providing the service. The Court so found in *Street* regarding the clause in the Railway Labor Act (367 U.S. at 771). It has so found with respect to the essentially similar clause in the National Labor Relations Act. *Radio Officers Union v. NLRB*, 347 U.S. 17, 41-42 (1954); *NLRB v. General Motors*, 373 U.S. 734, 738, 741 (1963). The NLRB has reached the same conclusion. *Local 959, Int. Brotherhood of Teamsters*, 66 LRRM 1203 (1967).

7. Decision Below Is Otherwise Clearly Erroneous.

The Court below is in error in a number of additional respects.

(a) There Was Breach of Duty of Fair Representation.

The Court below is in error in holding that there is no breach of the duty of fair representation in the use by a union over an employee's objection of funds ex-

acted from him under an agency fee agreement to support political and ideological purposes. Such a use amounts to a misappropriation of funds, which is a breach *per se* of the fiduciary duty of fair representation, and the situation is unlike those where the union has discretionary powers as in connection with seniority or pursuit of the remedy of arbitration in behalf of a discharged employee. *Cf. Ford Motor Co. v. Huffman,* 345 U.S. 330, 338-339 (1953). Conduct which is arbitrary and in bad faith is a breach of the duty, *Vaca v. Sipes,* 386 U.S. 171, 172 (1967), and misappropriation of funds falls within this category, *Seay v. McDonnell Douglas, supra,* 427 F. 2d 996, 1000 (1970).

(b) Misapplication of Lockridge Rule.

The Court below was manifestly wrong in applying the jurisdictional standards laid down by this Court in a different type of case, *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 299, 301, 302 (1971), to a determination of the merits of a claim for breach of the duty of fair representation, despite the express warning by this Court that "our decision must not be taken as expressive of any views on the substantive claims of the two parties to this controversy. Indeed our judgment is quite simply that it is not the task of federal or state courts to make such determinations" (403 U.S. at 302).

(c) Internal Remedy Did Not Negate Unfair Representation.

The Tenth Circuit was in error in holding that by providing *post litem motam* a retroactive internal union remedy for refund of agency fees illegally used for political purposes in previous years the union negates the unfair representation charge. This amounts to say-

ing that, if in each of the years preceding the filing of the complaint, the union had misappropriated petitioners' funds by using them for political purposes and so was guilty of a breach of its fiduciary duty, the breach in each one of those years would be wiped out if the union subsequently established an internal union remedy under which it would decide whether refund would be made and if so in what manner. A right of action for breach of fiduciary duty cannot be wiped out retrospectively in this way for it would constitute destruction of a vested right of property without due process of law, contrary to the Fifth Amendment. *Ettor v. Tacoma,* 228 U.S. 148, 155-56 (1913); *Lynch v. United States,* 292 U.S. 571, 579 (1934).

(d) Internal Union Remedy Not Binding on Non-Members.

The Court below, as a result of its misconception of the meaning of this Court's suggestion for settlement in *Brotherhood of Clerks v. Allen, supra,* 373 U.S. 113, 122-124, in effect relegated the petitioners to the new internal union remedy of their adversary. But a non-member of the union cannot be required to resort to an internal union remedy nor penalized for failure to do so. Under 29 USC 158(a)(3) the only thing that may be required as a condition of employment is the payment of compensation to the union for its services. The non-member cannot be forced to conform to other provisions of the constitution, by-laws, rules and regulations of the union. *NLRB v. General Motors Corp.,* 373 U.S. 734, 741-744 (1963); *Retail Clerks v. Schermerhorn,* 373 U.S. 746, 751-754 (1963).

Even a member of a union may not be required to resort to internal union remedies where they are con-

trolled by his adversaries in a controversy. *Glover v. St. Louis S. F. Ry. Co.*, 393 U.S. 324, 329-331 (1969); *Steele v. Louisville & Nashville R. R. Co.*, 323 U.S. 192, 205-206 (1944); *Tunstall v. Brotherhood of Locomotive F & E*, 323 U.S. 210, 211-213 (1944); *Vaca v. Sipes*, 386 U.S. 171, 184, 188 (1967). By the stronger reason, the requirement may not be imposed on nonmembers of the organization.

(e) Union Violated Statute and Agency Fee Clause.

The Court below was in error in failing without warrant to consider two very important issues raised by petitioners: (1) violation of the implied restrictions imposed by statute upon an agency fee agreement and (2) breach of an implied condition of the agency fee clause of the collective bargaining agreement.

The complaint not only makes allegations of facts which show violation of the statutory rights of the workers but also contains express statements to that effect [IR 6-16], as the Ninth Circuit held with respect to the identical allegations in *Seay, supra,* 427 F. 2d at 998, 1003. The complaint also sets forth facts showing violation of the agency fee clause of the collective bargaining agreement, and the Ninth Circuit so held with respect to the substantially similar allegations in *Seay* (427 F. 2d at 1000-1001), and as the defendant conceded both in the District Court before the first appeal and after remand. The District Court agreed with this view in the argument on the motion to dismiss in the first case [IIIR 14, IVR 41-43].

It has already been shown that the use of agency fees for politics violates the applicable statute, 29 USC 158(a)(3). See pages 12-13, *supra.*

The use of agency fees for politics also violates the agency fee clause of the collective bargaining agreement. This clause was entered into pursuant to the authority of 29 USC 158(a)(3) and subject to the restrictions it imposes. If the statute requires the agency fees to be used solely for collective bargaining and if it forbids any of the money from being diverted for political and ideological purposes, then the agreement entered into pursuant to its provisions is invalid unless it embodies a similar restriction. If it is construed in such a way as to sustain its validity this can only be accomplished by reading into it an implied provision forbidding the use of the money for politics. The Ninth Circuit in *Seay* adopted this construction (427 F. 2d at 1000-1001).

8. Case Presents Important Question of Statutory Interpretation Which Should Be Settled by This Court.

The case raises an important question about the interpretation of the National Labor Relations Act, as amended, governing the labor relations of the great majority of the employers and employees in the country which has not been but should be settled by this Court. As the conflict between the circuits shows, the decision of the Tenth Circuit throws into doubt and confusion the bearing of §8(a)(3) of that Act on the

fundamental political rights of employees subject to its provisions.

According to the Labor Relations Yearbook for 1972 (Bureau of National Affairs, Washington, D.C., p. 345), the membership of unions affiliated with the AFL-CIO in 1970 reached 20,690,000 employees or 22.6% of the total labor force in the United States. Unaffiliated or independent unions had a membership of 4,773,000 employees. Of all the labor contracts now being enforced, about 80% have compulsory union membership clauses which exact dues or agency fees from workers as a condition of employment. Most unions use the revenues so derived not only in collective bargaining but also in political activities.

9. The Case Presents an Issue of Political Expenditures Which Is of Major Public Importance.

The case presents an issue regarding political contributions and expenditures involving part of one of the most serious problems before the United States today, having judicial as well as legislative aspects. The case raises a judicial problem of the first magnitude. It deals not with voluntary contributions and expenditures for political purposes but with involuntary payments exacted as a condition of employment where the money is used over the objection of the citizens for political and ideological purposes to which they are opposed. The fundamental political rights of millions of workers have been left unsettled by the decision of the Court below and these rights are of so much

importance to the whole democratic process that the issue should be resolved in such a way as to give an impartial judicial remedy to those whose political rights are being subverted by the present system.

Conclusion.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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Counsel for Petitioners.

September 13, 1973.

APPENDIX.

Principal Constitutional, Statutory and Rule Provisions Involved.

Constitutional Provisions:

1. **First Amendment to the Constitution of the United States:**

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. **Fifth Amendment to the Constitution of the United States:**

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. **Ninth Amendment to the Constitution of the United States:**

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

4. **Fourteenth Amendment to the Constitution of the United States:**

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Statutory Provisions:

Jurisdictional Statutes:

Review by Certiorari of Decisions of Courts of Appeals.

1. **28 USC § 1254(1):**

"Case in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Jurisdiction of District Courts.

2. **28 USCA § 1331:**

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

3. **28 USCA § 1337:**

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

4. **Section 301 of the National Labor Relations Act, 29 USCA 185:**

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156."

5. **28 USC § 2201:—Declaratory Judgment Act:**

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Provisions of National Labor Relations Act:

1. Section 7 of the National Labor Relations Act, 29 USC 157:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8-(a)(3)."

2. Section 8(a)(3) and (b)(2) of the National Labor Relations Act, 29 USC 158(a)(3) and (b)(2):

"(a) It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by an action defined in this subsection as an unfair labor practice) to re-

quire as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

3. Section 9(a) of the National Labor Relations Act, 29 USC 159(a):

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided

further, That the bargaining representative has been given opportunity to be present at such adjustment."

* * *

Federal Rules of Civil Procedure:

1. Excerpts Rule 56, Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Opinion of the United States Court of Appeals for the Tenth Circuit.

United States Court of Appeals, Tenth Circuit.

May Term, 1973, No. 72-1596.

Appeal From the United States District Court for the Northern District of Oklahoma (D.C. No. 67-C-224). Reid v. Auto Workers, Local 1093, 479 F.2d 517.

Before BREITENSTEIN, Circuit Judge, DURFEE,* Judge, Court of Claims, and DOYLE, Circuit Judge.

BREITENSTEIN, Circuit Judge.

Plaintiffs-appellants, nonunion employees of McDonnell Douglas Corporation, sued defendant-appellee International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-AFL-CIO), District Lodge 1093, for declaratory judgment, injunctive relief, and damages, and alleged that over their objections, the Union wrongfully spent for political and ideological purposes agency fees which they were compelled to pay to the Union under a collective bargaining agreement between the Union and their employer. The trial court granted summary judgment in favor of the Union.

This case is here for the second time. The complaint named both the Union and the employer McDonnell Douglas as defendants. The trial court dismissed the action against the Union on the ground that the pre-emption doctrine created exclusive jurisdiction to hear the matter in the National Labor Relations Board and dismissed the employer because of the failure of the complaint to state a claim for which relief could be granted. In Reid v. McDonnell Corporation, 10 Cir.,

*Sitting by designation.

443 F.2d 408, we affirmed the dismissal of the employer and reversed the dismissal of the Union. With regard to the Union we held, Ibid. at 412, that jurisdiction "conceivably" exists under Vaca v. Sipes, 386 U.S. 171, and like cases. In so holding we noted that we did not intimate that the plaintiffs have asserted a meritorious claim and that to establish a breach of the duty of fair representation the plaintiffs must show the "union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 443 F.2d at 412, n. 13.

In 1965 and 1968, the employer or its predecessor and the Union made collective bargaining agreements which included provisions for an agency shop. As a condition of continued employment, employees were required either to be a member of the Union and pay Union dues or to pay to the Union monthly agency shop fees equivalent to the dues which Union members paid. The plaintiffs are not members of the Union. They allege that the Union used a portion of their compulsory agency fees in the support of political and economic doctines, ideologies, and legislative programs to which they are opposed and which were not reasonably necessary to collective bargaining.

The Union concedes (1) it spends compulsory agency fees and union dues for the support of candidates for state and local office and for legislative, educational, citizenship, and social objectives of the Union, (2) it stands in a fiduciary relationship to plaintiffs and owes them the duty of fair representation, and (3) an employee who must pay agency fees as a condition of continued employment and who objects to the use of a portion of his fees for political and ideological purposes with which he disagrees has a right, after

specifically informing the Union of his objection, to request and receive a pro rata rebate.

For several years before the filing of the complaint in November, 1967, the constitution of the Union provided that a member could divert the portion of his dues allocated to the "Local and International Citizenship Funds" into a nonpartisan citizenship organization. In 1968 the Union replaced this provision with one which gives both a member and a payer of agency fees an intra-union remedy whereby he can receive a pro rata rebate of that portion of his dues or fees spent for political and ideological causes to which he objects.[1] Identical language is found in the currently effective 1970 constitution of the Union. Another provision of the constitution gives nonmembers covered by agency shop clauses "all the material benefits to which members are entitled." Thus, the rebate procedure is

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[1]Art. 16, § 7 of the 1968 constitution reads:

"Any member shall have the right to object to the expenditure of a portion of his dues money for activities or causes primarily political in nature. The approximately proportion of dues spent for such political purposes shall be determined by a committee of the International Executive Board, which shall be appointed by the President, subject to the approval of said Board. The member may perfect his objection by individually notifying the International Secretary-Treasurer of his objection by registered or certified mail; provided, however, that such objection shall be timely only during the first fourteen (14) days of Union membership and during the fourteen (14) days following each anniversary of Union membership. An objection may be continued from year-to-year by individual notifications given during each annual fourteen (14) day period.

"(b) If an objecting member is dissatisfied with the approximate proportional allocation made by the committee of the International Executive Board, or the disposition of his objection by the International Secretary-Treasurer, he may appeal directly to the full International Executive Board and the decision of the International Executive Board shall be appealable to the Public Review Board or the Convention at the option of said member."

available to each of the plaintiffs. None of them have tried to utilize it or to exhaust appeal procedures available under the Union constitution. Those procedures culminate in the Public Review Board which is provided by the Union constitution and which is made up of seven persons not associated with the Union.

The Supreme Court has held that an agency shop arrangement which leaves union membership optional with employees but requires, as a condition of continued employment, nonunion employees to pay to the union sums equal to the dues of union members is not prohibited by §§ 7 and 8 of the National Labor Relations Act, 29 U.S.C., §§ 157 and 158, and that § 8(a)(3), 29 U.S.C. § 158(a)(3) does not prohibit such an arrangement. National Labor Relations Board v. General Motors Corp., 373 U.S. 734, 735. In upholding federal jurisdiction in the instant case we expressed no opinion on whether the plaintiffs had asserted a meritorious claim, 443 F.2d at 413, n. 13, and cited *Vaca v. Sipes*, 386 U.S. 171, 190.

Plaintiffs argue that the Union breached the fair representation duty by the unlawful misappropriation of agency fees for political and ideological expenditures objectional to them. The first question is the lawfulness of this use of the fees. In Machinists v. Street, 367 U.S. 740, 770, the Supreme Court held that § 2 of the Railway Labor Act, 45 U.S.C. § 152, forbade the exaction of funds from members for the support of political causes to which they objected. This decision was followed by Railway Clerks v. Allen, 373 U.S. 113, which discusses the relief which might be granted a dissenter in an appropriate case. Ibid. at 120-123. The dissenter must make his objection known to the union, and it has the burden of establishing what percentage

of total union expenditures are for political purposes. The opinion suggests that a decree might order refund of the exacted funds in the proportion that union political expenditures bear to total union expenditures and a reduction of future exactions by the same proportion. As to the latter, the court recognized the practical difficulty caused by fluctuating expenditures. *Ibid.* at 122. The opinion concluded by reminding the parties "of the availability of more practical alternatives to litigation for the vindication of the rights and accommodation of interests here involved." *Ibid.* at 124.

The Street and Allen decisions were under the Railway Labor Act. We are concerned with the National Labor Relations Act. Our first decision in this case recognized the difference and said that we cannot agree that the rationale of the Railway Act cases applies to the present controversy. 443 F.2d at 410-411. On this appeal the Union does not rely on the difference between NLRA and RLA. Instead, it says that in recognition of the RLA cases it has adopted a complying intra-union remedy.

The 1968 amendment to the Union constitution provides that any member may object to the expenditure of a portion of his dues for "activities or causes primarily political in nature." The proportion of dues spent for political purposes is determined by a committee of the International Executive Board. Objections must be made to the International Secretary-Treasurer and renewed annually. If an objector is dissatisfied with the proportional allocation or the disposition of his objection he has appeal rights which culminate in the Public Review Board made up of nonunion personnel. Nonmembers covered by agency shop contracts have the rights of members.

We are not impressed by the plaintiffs' attacks on the remedy which the Union has provided. We believe that it is a good faith effort to comply with the teachings of Street and Allen. No plaintiff has tried to utilize the procedure. We do not know how it will work in actual practice. We are not confronted with any dispute over its application or operation. Our problem is whether the record supports a claim of unfair representation.

Our first decision holds that plaintiffs' claim of unfair representation is sufficient to establish jurisdiction in the federal courts under the doctrine of Vaca v. Sipes, 386 U.S. 171, 443 F.2d at 411-412. It did not determine the merit of that claim. The question of merit must be determined under the standards mentioned in Vaca, 386 U.S. at 190, and those stated in the later decision of Motor Coach Employees v. Lockridge, 403 U.S. 274, 299, 301. If those standards are not met, the claim of unfair representation falls. The standards are whether union conduct is arbitrary, discriminatory, or in bad faith, 386 U.S. at 190, and whether there is fraud, deceit, dishonest conduct, or discrimination that is intentional, severe, and unrelated to legitimate union activities. 403 U.S. at 299, 301.

In the record before us we find no facts establishing discrimination, fraud or dishonesty. Plaintiffs, by speculative, conclusionary, and argumentative statements condemn the Union remedy as unfair, unreasonable, and unworkable. Those statements do not suffice to create an issue of fact. Bumgarner v. Joe Brown Company, 10 Cir., 376 F.2d 749, 750, cert. denied 389 U.S. 831, and Applegate v. Top Associates, Inc., 2 Cir., 425 F.2d 92, 96. We have no concrete particulars to sustain any of the elements which the Supreme

Court says are pertinent to a claim of unfair representation. At the most the statements are conjectures as to how the union remedy might work in imagined circumstances.

We attach no significance to the fact that the Union remedy is provided by a constitutional amendment adopted during the pendency of this litigation. It may be true the Union saw the handwriting on the wall and decided that under Street and Allen some remedy must be made available. The question is whether that remedy, on its face negates the unfair representation charge. We believe that it does.

This conclusion makes it unnecessary to decide whether exhaustion of union remedies is a prerequisite to court action, or whether the trial court erred in not permitting the case to proceed as a class action. The question of the plaintiffs' right to amend their complaint or to file a supplemental complaint is committed to the discretion of the trial court. Rule 15 (a) and (d), F.R.Civ.P.; Arp v. United States, 10 Cir., 244 F.2d 571, 574, cert. denied 355 U.S. 826. The record shows no abuse of that discretion.

Affirmed.

Findings of Fact, Conclusions of Law and Judgment.

In the United States District Court for the Northern District of Oklahoma, June 14, 1972.

This cause came on to be considered on the motion of defendant, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) Local 1093 for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure and the recommendations of the United States Magistrate, to which defendant objected. The Court, having considered the pleadings, affidavits, briefs, memoranda, arguments of counsel (as reflected in the transcript of the proceedings before the United States Magistrate), files in this case, the recommendations of the United States Magistrate, the objections thereto, and due deliberation having been had thereon, the Court now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Plaintiffs are citizens of the United States, State of Oklahoma, and of this judicial district.

2. Plaintiffs are or have been employed by McDonnell-Douglas Aircraft Company in its Tulsa, Oklahoma plant. McDonnell-Douglas Aircraft Company is an industry affecting interstate commerce.

3. Three of the named plaintiffs are no longer employed by McDonnell-Douglas Aircraft Company in Tulsa, Oklahoma, and, thus, pay no agency shop fees to the Union, to-wit: C. E. Valentine, Norma S. Simpson and Kenneth G. Teel.

4. Four of the named plaintiffs have sent letters requesting the withdrawal of their names as plaintiffs,

to-wit: Melva W. Hodges, C. R. Puls, C. W. Ross, and S. Marie Olson.

5. Defendant, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) Local 1093 (hereinafter "union") is a labor union located in this judicial district. It is a local union of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (hereinafter "International Union"); and, with the International Union, is the exclusive bargaining representative for the collective bargaining unit in which plaintiffs are employed.

6. In 1965 and 1968, McDonnell-Douglas Aircraft Company (or its predecessor in interest) and the UAW entered into collective bargaining agreements establishing the wages, hours, and terms and conditions of employment for employees in the bargaining unit at Tulsa, including plaintiffs.

7. Pursuant to Article V of the 1965 agreement, what is commonly known as an "agency shop" existed in this bargaining unit. As a condition of continued employment, employees were required either to be a member of the Union and pay Union dues, or to pay to the Union monthly agency shop fees equivalent in amount to the dues which Union members paid. Article V was continued in the 1968 collective bargaining agreement.

8. Plaintiffs, and each of them, have never been, nor do they wish to become full-fledged members of the Union or the International Union.

9. Since June 26, 1965, each of the plaintiffs has been required, as a condition of employment, to pay agency shop fees, until the agreement of 1971, not at

issue in the present litigation, the Court having denied plaintiff's motion for leave to file supplemental complaint. Each of the plaintiffs has paid the required fees, since the Union would cause McDonnell-Douglas Aircraft Company to discharge any employee in the bargaining unit who failed and refused to pay these fees as required by the agreement.

10. In November, 1967, plaintiffs filed this action, alleging that the Union was diverting a portion of their compulsory agency fees to the support of political candidates, political and economic doctrines, ideologies, and legislative programs to which plaintiffs are opposed, and which were not reasonably necessary to collective bargaining. The complaint asks declaratory judgment, monetary damages and injunctive relief. This Court dismissed the action against defendant Union on the ground that the National Labor Relations Board had exclusive jurisdiction. On appeal, the Tenth Circuit Court of Appeals reversed and remanded as to the Union, holding that, on the record as it then stood, jurisdiction "conceivably" did exist under the unfair representation theory of Vaca v. Sipes (1967) 386 U.S. 171.

11. The Union concedes, and this Court finds, that both the defendant Union and the International Union have spent and continue to spend compulsory agency shop fees, along with Union dues money, for the support of candidates for state and local office; and for legislative, educational, citizenship, social and economic objectives of the UAW.

12. The Union concedes that it stands in a fiduciary relationship to plaintiffs, and owes plaintiffs a duty of fair representation.

13. The Union concedes that any employee who does not pay Union dues and who must pay agency shop fees as a condition of retaining employment, and who objects to the use of a portion of his fees along with Union dues by the Union for political candidates, doctrines, and causes with which the employee disagrees, has a right, after specifically informing the Union of his objection, to request and receive a pro rata rebate.

14. For several years before the instant litigation was filed, Article 16, §6 of the Constitution of the International Union provided that, by yearly notification of the Secretary-Treasurer of the International Union, any member could divert the portion of his dues or fees which was allocated to the Local and International Citizenship Funds into a non-partisan citizenship organization.

15. In May, 1968, the Convention of the International Union replaced the old provision with a new and more extensive section, which provides both the member and the payer of agency shop fees with an intra-union remedy whereby he can receive a pro rata rebate of that portion of his fees or dues spent for political candidates, doctrines, and causes to which he objects. This section provides as follows:

> "Any member shall have the right to object to the expenditure of a portion of his dues money for activities or causes primarily political in nature. The approximate proportion of dues spent for such political purposes shall be determined by a committee of the International Executive Board, which shall be appointed by the President, subject to the approval of said Board. The member any perfect his objection by individually notifying the

International Secretary-Treasurer of his objection by registered or certified mail; provided, however, that such objection shall be timely only during the first fourteen (14) days of Union membership and during the fourteen (14) days following each anniversary of Union membership. An objection may be continued from year-to-year by individual notifications given during each annual fourteen (14) day period.

"(b) If an objecting member is dissatisfied with the approximate proportional allocation made by the committee of the International Executive Board, or the disposition of his objection by the International Executive Board and the decision of the International Executive Board shall be appealable to the Public Review Board or the Convention at the option of said member." (Article 16, §6, 1968 Constitution of the International Union)

The identical language is present in the 1970 Constitution of the International Union at Article 16, §7 and is currently in effect.

16. Although the rebate provisions of Article 16 reads "[a]ny member shall have the right * * *, Article 6, §20 of the Constitution of the International Union provides:

"Non-members covered by an agency shop clause in a UAW contract shall receive all the material benefits to which members are entitled * * *."

17. The UAW's comprehensive rebate procedure is available to and expressly adopted in 1968 for both non-members who pay shop fees under a UAW contract, and full-fledged union members. Thus, the UAW's rebate procedure is available to each of the plaintiffs.

18. To claim a rebate under the UAW's internal procedure each of these plaintiffs must write a certified letter to Emil Mazey, Secretary-Treasurer of the International Union, within fourteen days following the anniversary of the commencement of his agency fee payments.

19. Plaintiffs have had constructive and actual notice of the existence of the rebate procedure.

20. None of the plaintiffs have begun an action or attempted to utilize the available rebate procedure, nor have any of them attempted to exhaust any other appeal procedures available to them under the Constitution of the International Union.

21. At no time since the filing of the instant litigation have any of the named plaintiffs filed a grievance under the McDonnell-Douglas UAW collective bargaining agreement concerning the matters raised in the instant litigation.

22. At no time have any of the plaintiffs complained to either the Union or the International Union concerning the Union's expenditure of funds, except by the filing of pleadings and affidavits in the course of this litigation.

23. There is no record evidence of any complaint or protest concerning the subject matter of this suit by any member of this bargaining unit other than the named plaintiffs.

24. Since the new rebate procedure was established, money has been refunded to dissident individuals on at least 37 occasions.

25. If plaintiffs pursue the rebate procedure, the International Union is prepared to refund not only the

pro-rated portion of agency fees and dues money expended for partisan political purposes, but also that pro-rated portion of agency fees and dues money spent for various other doctrines and causes to which plaintiffs object, including, but not limited to: American Civil Liberties Union, NAACP, Citizens Crusade Against Poverty, United Nations, National Urban League, SCLC, Metropolitan Detroit Council of Churches, and National Committee for a SANE Nuclear Policy.

26. The rebate available under the procedure presently available to each of these plaintiffs is not limited to monies spent since the individual made specific objection. The UAW's rebate procedure in Article 16, §7 provides a means by which a dissenter can recover that portion of compulsory monies spent for an unspecified time prior to the objection. Nothing in Article 16, §7 or in the affidavits indicates that the UAW rebate procedure, as it currently exists, may not, if used by plaintiffs, provide each of them with a full prorated refund of monies spent before May 1968 for causes, doctrines, and candidates with which plaintiffs disagree. It appears from the affidavits that the UAW could, if plaintiffs invoke the rebate procedure, provide rebates for periods prior to May, 1968, the effective date of the new rebate procedures (Mazey's affidavit of September 17, 1971.)

27. If a dissenter, such as these plaintiffs, pursues the rebate procedure and is dissatisfied with the approximate proportional allocation made by committee of the Executive Board of the International Union, or the disposition of his objection by the Secretary-Treasurer of the International Union, he may appeal directly to the full Executive Board of the International Union.

28. If dissenters, such as these plaintiffs, are dissatisifed with the decision of the full Executive Board of the International Union, that decision may be appealed, at the option of the dissenter, either to the Convention of the International Union, or the Public Review Board.

29. The Public Review Board is a body of seven individuals, established under Article 32 of the Constitution of the International Union.

30. By the terms of Article 32, none of the members of the Public Review Board may work under the jurisdiction of the UAW nor may they be employed by the International Union or any of its subordinate bodies. Although the initial seven members were appointed by the International Union, the Public Review Board is self-perpetuating in that vacancies are filled from a list of names submitted by the remaining members.

31. The present members of the Public Review Board are:

(i) Msgr. George G. Higgins, Chairman, Director of the Division of Urban Life, Department of Social Development, U.S. Catholic Conference;

(ii) Dr. Jean T. McKelvey, New York State School of Industrial and Labor Relations;

(iii) Professor Harry W. Arthur, Associate Dean of Osgood Hall Law School, York University, Ontario, Canada;

(iv) Robben W. Fleming, President of the University of Michigan, Professor of Law, University of Michigan, and well known arbitrator;

(v) Professor James E. Jones Jr., University of Wisconsin Law School;

(vi) Professor Frank W. McCulloch, University of Virginia Law School, former Chairman of the National Labor Relations Board; and

(vii) Rabbi Jacob Weinstein, Rabbi Emeritus, K.A.M. Temple of San Francisco.

32. Previous members of the Public Review Board have included:

(i) Judge George E. Bowles of the Wayne County Circuit Court;

(ii) Judge George N. Leighton, Cook County, Illinois;

(iii) Judge Wade H. McCree of the United States Sixth Circuit Court of Appeals;

(iv) the late Rabbi Morris Adler; and

(v) The Rev. Dr. Henry Hitt Crane, former minister of Detroit Central Methodist Church.

33. Under Article 32 §3(b) of the Constitution of the International Union, the Public Review Board has the authority and duty to make final and binding decisions on all cases appealed to it in accordance with the rebate provisions of Article 16.

34. None of plaintiffs have attempted or exhausted the appeals available under the Constitution of the International Union.

35. The provisions of the contract between the Union and McDonnell-Douglas Aircraft Company have been applied uniformly and regularly with respect to all employees covered by that agreement. The plaintiffs have been treated exactly the same as any other person covered by the agreement.

36. The record is devoid of any evidence of bad faith, hostility, arbitrary treatment, fraud, dishonesty or severe and intentional discrimination.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact the Court concludes as follows:

1. This Court has jurisdiction under 29 USC §159 (a) and 29 USC §185(a) insofar as plaintiffs allege breach of the Union's duty of fair representation within the meaning of Vaca v. Sipes (1967) 386 U.S. 171.

2. Venue is proper under 28 USC §1391(b).

3. Where, as here, an employee seeks to recover from a union that portion of his compulsory agency fees which have been used for political and other causes to which the employee objects, a class action is improper unless each member of the proposed class has (a) specifically objected to the use of his money for the offending causes; and (b) has affirmatively communicated both his objection and his desire for a refund to appropriate union officials. In the absence of such objection and communication, dissent will not be presumed. IAM v. Street (1961) 367 U.S. 740.

4. In the absence of the specific objection and communication required by Street, supra, a class action will be inappropriate under Rule 23 of the Federal Rules of Civil Procedure because: (a) it may not be presumed that the claims of the individual plaintiffs are typical [Rule 23(a)(3)], and (b) it may not be presumed that the individual plaintiffs can fairly and adequately protect the interests of the proposed class [Rule 24(a)(4)]. To presume the contrary would risk denying the non-dissenting majority due process of law. Hansberry v. Lee (1940) 311 U.S. 32.

5. This suit may not be maintained as a class action consistent with the principles of Street, supra,

and Hansberry, supra, since there is no evidence in the record of any complaint or protest to appropriate Union officials by any member of this bargaining unit other than the named plaintiffs, and, also, since four of the named plaintiffs have indicated in writing that they no longer wish to be plaintiffs in the instant litigation.

6. The claims of the individual plaintiffs are not, and may not be presumed to be typical; nor is there any proof that the individual plaintiffs fairly and adequately represent the interests of the proposed class.

7. This litigation may not be maintained as a class action because it fails to meet the prerequisites of the current Rule 23(a) of the Federal Rules of Civil Procedure.

8. The agency shop provisions of Article V of the 1965 and 1966 collective bargaining agreement between the UAW and McDonnell-Douglas Aircraft Company, or its predecessor, imposed only financial obligations on members of this bargaining unit.

9. The conclusion of 8 above, therefore, make the Union Security provisions of the 1965 and 1968 agreements, as written, lawful, valid and enforceable. NLRB v. General Motors Corporation, (1969) 373 U.S. 743.

10. In remainding this case, the Tenth Circuit Court of Appeals, while holding that jurisdiction "conceivably does exist", 443 F.2d 408, 412, nevertheless stated that it did "not mean to intimate that the plaintiffs have asserted a meritorious claim", 443 F.2d 408, 412 n. 13.

11. The Tenth Circuit Court of Appeals remanded this case as to the Union because the factual record on appeal was inadequate both on the issue of unfair representation and on the issue of internal union rem-

edies. As is appropriate on a motion for summary judgment under Rule 56, both parties have made significant additions to the factual record, now giving this Court an advantage which the Tenth Circuit Court of Appeals did not have on the original appeal.

12. The pleadings, affidavits, and files in this case show, and this Court concludes, that there is no genuine issue as to any material fact.

13. The Tenth Circuit Court of Appeals found that to sustain an action for breach of the duty of fair representation, "plaintiffs must show the 'union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.'" 443 F.2d 408, 412, n. 13, citing Vaca v. Sipes (1967) 386 U.S. 171.

14. Since the Tenth Circuit Court of Appeals decision, the United States Supreme Court has reaffirmed and elaborated the Vaca, supra, standard in Motor Coach Employees v. Lockridge (1971) 403 U.S. 274. Under Lockridge, supra, the complaining party must plead, and be able to prove by substantial evidence, union discrimination that is (a) intentional, (b) severe, and (c) unrelated to legitimate union objectives; and which is also (d) fraudulent, deceitful, dishonest, irrational, arbitrary, invidious, hostile, or otherwise discriminatory.

15. To survive the instant motion for summary judgment, plaintiffs must meet the standards of Vaca, supra, and Lockridge, supra.

16. Where, as here, defendant has submitted detailed affidavits in support of summary judgment, plaintiffs may not rest on their pleadings, or upon conclusionary and speculative affidavits. Neither reassertion of the allegations of the complaint, nor speculation and

conclusion under oath will create any issue of material fact in such circumstances.

17. Under the standard of Vaca, supra, and Lockridge, supra, summary judgment is proper in the instant litigation because, under the facts, there is no meritorious claim of unfair representation.

18. IAM v. Street (1961) 367 U.S. 740, 773-5, and Brotherhood v. Allen (1963) 373 U.S. 113, both indicate a desire on the part of the United States Supreme Court to protect political activities traditionally conducted by labor organizations. As was also recognized in the recent case of Marker v. Connally (DC DC, 1972) 337 F.Supp, 1301, 1304, a restraint on expenditures for political activities by labor organizations might well be offensive to the First Amendment.

19. Under Street, supra, and Allen, supra, any employee who must pay compulsory agency shop fees or dues, and who specifically objects to the use of a portion of his fees or dues by the union for political candidates, doctrines, and causes with which the employee disagrees, has a right, after specifically informing the union of his objection, to request and receive a pro-rata rebate.

20. A dissident is entitled to no more than a pro-rata rebate. He is not entitled to request a rebate on behalf of others who have not made their objections specifically known to the Union. Nor is he entitled to otherwise interfere with the traditional, lawful political activities of the union or with a lawful union security provision of a collective bargaining agreement.

21. When the Tenth Circuit Court of Appeals remanded this case, it remarked that the record was too incomplete to reach a decision on the following issues:

(i) the existence of an internal UAW remedy, particularly with respect to the rebate provisions;

(ii) the availability of such a remedy to plaintiffs; and

(iii) whether or not plaintiffs had attempted to exhaust internal union remedies.

In addition, the Court of Appeals for the Tenth Circuit expressed doubts as to whether the UAW rebate procedure was properly before the Court.

22. Since the Tenth Circuit Court of Appeals remanded this case, the Union has introduced appropriate proofs as to the existence, nature and adequacy of internal union remedies, and in particular the rebate remedies available to each of these plaintiffs. The record on the issue of internal union remedies is now complete, and properly before this Court.

23. The Constitution of the International Union provides an adequate, fair, and reasonable procedure which is available to each of these plaintiffs, whereby each can receive the entire pro rata rebate to which he is entitled under Street, supra, and Allen, supra.

24. In the event a dissident is unhappy with the decision of the International Union, said dissident has a right of appeal to an independent body, heretofore discussed in the Findings of Fact.

25. Plaintiffs have speculated, both under oath and in argument, that the rebate procedure is inherently unfair and unreasonable because it is in the control of the UAW or its appointees. Plaintiffs' speculative conclusions, however, create no genuine issue of material fact on this point in view of the Union's detailed affidavits showing the existence, simplicity, effectiveness,

and nature of the procedure, as well as the character of the members of the Public Review Board.

26. The Court concludes that it is the policy of the United States Supreme Court to foster internal union remedies, such as the UAW rebate provisions, as a "more practical alternative to litigation for the vindication of the rights and the accommodation of interests here involved". Brotherhood v. Allen (1963) 373 U.S. at 122-4. This policy finds additional voice in statute, e.g., 29 USC §411(a)(4).

27. Plaintiffs speculate that the rebate procedures will not, if attempted, prove available to non-members as plaintiffs. Plaintiffs' speculative conclusions, however, create no genuine issue of material fact on this point in view of the Union's detailed affidavits showing the contrary by reference to the legislative history of the rebate provisions; another article of the Constitution of the International Union which guarantees non-member agency shop fee payers all the material rights of a union member; and the sworn statement of the International Union of their willingness to entertain rebate demands from these plaintiffs if they follow the rebate procedure.

28. Plaintiffs speculate that the rebate procedures, if attempted will not provide pro-rata refunds for that portion of agency shop fees spent for all of the various doctrines and causes to which plaintiffs object. Plaintiffs' speculative conclusions create no genuine issue of material fact in view of the Union's affidavits showing that, if the rebate procedure is followed, the UAW is ready to provide prorated rebates for monies spent on a range of causes and doctrines, many of which are not of a partisan political nature; and that the rebate pro-

vision in the Constitution of the International Union does not restrict rebates as plaintiffs fear.

29. Plaintiffs speculate that the current rebate procedures, if attempted, will not provide prorated refunds for that portion of agency shop fees spent before May, 1968, when the new rebate procedure was enacted, for causes, doctrines, and candidates with which plaintiffs disagree. Plaintiffs' speculative conclusions create no genuine issue of material fact in the face of the Union's showing that the current UAW rebate procedure is sufficiently broad to allow a dissenter to recover that portion of compulsory monies spent for an unspecified time prior to the objection, including dates prior to May, 1968, when the new rebate provisions were enacted; and in view of the Union's affidavit showing that the UAW could, if plaintiffs invoke the current rebate procedure, provide rebates for periods prior to May, 1968.

30. The requirement in the rebate provision that dissenters claim their rebates within 14 days following the anniversary of the commencement of their compulsory union support payments is reasonable. Given the large membership of the International Union, such a provision is, no doubt, necessary in order to distribute the claims over the calendar year and make effective administration possible. Because a dissenter may receive a retroactive rebate under the provisions of Article 16, §7, he need not lose any monies rightfully due him. A labor union has a right to enact reasonable procedural rules to facilitate effective administration.

31. Following the United States Supreme Court's suggestion in Allen, supra, the UAW had adopted an internal rebate procedure which is reasonable, fair, and available to each of these plaintiffs, and adequate enough to provide each plaintiff with the relief to which he is entitled under Street, supra, and Allen, supra.

None of the plaintiffs has seen fit to attempt to use this rebate procedure. They allege that the principles of Street, supra and Allen, supra, have been violated by the mere fact that the Union uses a portion of their compulsory fees for political purposes, and would have this Court presume that the UAW rebate procedure is legally inadequate without having attempted to utilize the designated procedure.

32. Under Street, supra, and Allen, supra, no legal wrong has been done plaintiffs until they have been refused an adequate rebate by the Union. Only the refusal of the Union to make an adequate rebate to each plaintiff can be legally challenged in an action based on Street, supra, and Allen, supra. There is no showing by plaintiffs that they have attempted to or exhausted the UAW rebate procedure, and they have advanced no legally adequate excuse for this failure.

33. In Allen, supra, the Supreme Court indicated that a union is entitled, and in fact encouraged, to establish internal procedures whereby dissidents could get these rebates; the implication being that, where such reasonable and adequate procedures exist, a union cannot be said to have refused to give an adequate

rebate until the internal procedure has been tried, exhausted, and found inadequate.

34. The Court finds the defendant Union's motion for summary judgment must be granted as a matter of law; there being no genuine issue of material fact. This cause, then, does not present a justiciable case or controversy. To arrive at any other conclusion would allow dissidents to avoid reasonable and adequate internal procedures by conclusionary pleading and speculative affidavits; would make the establishment of such procedures futile; and would run contrary to the clear policy of the Allen, supra, case. There can be no legal wrong until an adequate rebate has been refused, and there can be no refusal until the UAW rebate procedure is found inadequate. Thus, plaintiffs' claim of a legal wrong under Street, supra, and Allen, supra, is not properly before this Court until plaintiffs have used the rebate procedure and found it wanting.

35. Federal labor law recognizes a strong policy in favor of resolving disputes, particularly disputes between a union and those it represents, by intial resort to reasonable internal union remedies. This policy is particularly appropriate in this type of case, in view of the Supreme Court's ruling in Allen, supra; that this is the type of controversy which the Courts should refrain from entertaining when it discovers that the union adopted a "plan by which dissenters could be afforded an internal union remedy."

36. Exceptions to this policy exist where an available internal remedy would be utterly futile, or other-

wise obviously worthless. The Court will not presume futility on the strength of plaintiffs' conclusory speculations; where plaintiffs have not availed themselves of the internal remedies.

37. Plaintiffs have failed to begin or to exhaust the grievance procedure available under the UAW-McDonnell Douglas collective bargaining agreement.

JUDGMENT

IT IS ORDERED that Summary Judgment be entered, based on the above Findings of Fact and Conclusions of Law, in favor of the defendant Union, and against the plaintiffs herein, and each of them. Defendant Union is awarded costs, but no attorney fees.

ENTERED this 14th day of June, 1972.

/s/ Allen E. Barrow
CHIEF UNITED STATES DISTRICT JUDGE

Reid v. McDonnell Douglas, 443 F.2d 408 (1971).

United States Court of Appeals, Tenth Circuit, May 1971 Term, No. 417-70.

Appeal From the United States District Court, for the Northern District of Oklahoma, (D.C. No. 67-C-224).

Before LEWIS, Chief Judge, PICKETT and ADAMS,* Circuit Judges.

ADAMS, Circuit Judge

This case presents a difficult question concerning the jurisdiction of the federal courts to hear a dispute regarding whether a union may spend dues for political purposes over the objection of non-union members compelled to pay such dues pursuant to an agency shop agreement between their employer and the union.

Plaintiffs purport to represent a class of employees of McDonnell Douglas Corporation who are not members of the United Auto Workers (UAW) but who are required to pay dues as a condition of employment under an agency shop clause in the contract between the UAW and McDonnell Douglas.[1]

In a complaint filed in the United States District Court for the Northern District of Oklahoma in 1967, plaintiffs allege that the UAW spends a portion of the plaintiffs' dues for political candidates and causes which are opposed by the plaintiff-employees. However, these employees do not allege that they protested such expenditures, or that they have demanded a pro rata refund or reduction in their dues. The alleged injury is the imposition on such employees of political and

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*Of the Third Circuit, sitting by designation.

[1]*See generally The Agency Shop, Federal Law, and the Right to Work States,* 71 Yale L.J. 330 (1961).

ideological conformity in violation of the first, fifth, ninth and fourteenth amendments to the Constitution, the UAW's duty of fair representation, a duty implied under § 9(a) of the National Labor Relations Act[2] ("the Act"), and of an implied condition in the collective bargaining agreement.[3] Jurisdiction is alleged under 28 U.S.C. § 1331(a) and 29 U.S.C. § 185 (§ 301 of the Labor-Management Relations Act).[4] The complaint requested a declaratory judgment, monetary damages and injunctive relief. Upon defendants' separate motions to dismiss, District Judge Allen E. Barrow dismissed the action against the UAW on the ground that the preemption doctrine created exclusive jurisdiction to hear the matter in the National Labor Relations Board and dismissed the claim against McDonnell Douglas on the ground that the complaint failed to state a claim against McDonnell Douglas for which relief may be granted.

The plaintiff-employees here recognize that the Supreme Court in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), held that whenever a party challenges union activity arguably protected by § 7 or prohibited by § 8 of the Act, the doctrine of primary jurisdiction requires "federal courts [to] defer to the exclusive competence" of the NLRB. *Id.* at 245. Plaintiffs contend, however, that their claim comes

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[2]29 U.S.C. § 159(a); *see* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

[3]This claim is not explicitly made in the complaint, but for purposes of this appeal we will treat it as properly raised.

[4]Plaintiffs later sought to amend their complaint to allege jurisdiction also under 28 U.S.C. § 1337. The District Court refused to allow such amendment because it was proposed, with several other amendments, immediately before the Court was to announce its decision on the complaint as filed, and the case had already been fully briefed by the parties on a different basis.

within one of the several exceptions to primary jurisdiction.

The first exception invoked by the plaintiffs regards their claim that "[t]he exaction of compulsory agency fee payments * * * abridges rights guaranteed to them under the First [and] Fifth Amendments * * * of the United States Constitution." Plaintiffs assert this claim is sufficient to bring them within the "arising under" jurisdiction of 28 U.S.C. § 1331(a).[5] By their terms, the first and fifth amendments proscribe federal governmental action, not the actions of private persons. In International Association of Machinists v. Street, 367 U.S. 740 (1961), the Supreme Court met this issue by relying on its analysis in Railway Employees Department v. Hanson, 351 U.S. 225, 231-2 (1956). In *Hanson*, Justice Douglas reasoned that the Railway Labor Act expressly superseded state laws prohibiting the union shop. Accordingly, contracts negotiated with a union shop provision necessarily carry the "imprimatur of the federal law", the element which provides the required governmental action. Indeed one may argue further that the union shop is a device which Congress had decided to encourage in the railway industry by nullifying any state laws to the contrary. Union activity pursuant to such encouragement is thus within the traditional ambit of "state action" analysis under the fourteenth amendment[6]—a concept bearing close analogy to the federal governmental action required to invoke

[5] "The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of $10,000 * * * and arises under the Constitution, laws, or treaties of the United States."

[6] *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948). This analysis and its criticism is suggested by H. H. Wellington in *Labor and the Legal Process*, 242-252 (1968).

the first and fifth amendments. Whatever the wisdom of this reasoning for the Railway Labor Act, it has no applicability to the National Labor Relations Act. For in Retail Clerks International Association, Local 1625 v. Schermerhorn, 373 U.S. 746 (1964), the Court held that the agency shop, authorized by §§ 7 and 8 (a)(3) of the Act, is limited by § 14(b) of the Act, thus permitting the states to forbid it. Unlike the union shop in *Hanson* and *Allen*, the agreement here could be "made illegal [or] vitiated by * * * the laws of a state." *Hanson, supra*, at 232. While the union shop provision in the Railway Labor Act is not compulsory in the sense that management and labor are not required to establish such a shop, the provision does give management and labor the right to bargain for a union shop and mandates that states not interfere with that right. This mandate is part of a most comprehensive regulatory scheme whose entire history his been one of very active governmental supervision and treatment. See *Street, supra*, at 750-764. Moreover, the rail unions have been given extremely broad responsibilities for their union members beyond anything permitted or mandated under the National Labor Relations Act.[7] *See e.g.*, 45 U.S.C. §§ 152, 156.

By contrast, the policy with respect to union security agreements expressed in the NLRA is more neutral and permissive than the policy of the RLA. See the analysis of governmental action in Reitman v. Mulkey, 387 U.S. 36[illegible], 373-381 (1967); *cf.* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). In NLRA matters, the federal government does not ap-

[7]Such omnibus control over workers in an enterprise might be analogized to the company town in Marsh v. Alabama, 326 U.S. 501 (1946); see Wellington, *supra*, n. 5 at 244.

pear to us to have so far insinuated itself into the decision of a union and employer to agree to a union security clause so as to make that choice governmental action for purposes of the first and fifth amendments.[8] In Seay v. McDonnell Douglas Corp., 427 F2 996 (9th Cir. 1970), the Ninth Circuit relied on *Hanson* and *Street* as demonstrating the existence in the federal courts of jurisdiction to hear the type of constitutional claim raised here. However, the *Seay* court did not consider the question of governmental action, and for the reasons stated above, we cannot agree that the rationale of the Railway Labor Act cases applies to the present controversy.[9]

Plaintiffs alleged in their brief on appeal that the NLRA is unconstitutional if its effect is to allow the UAW to spend the plaintiffs' dues on political purposes opposed by them. However, the plaintiff's complaint nowhere attacks the constitutionality of the Act on this or any other basis. If such an attack were made, it might well be insubstantial in light of National Labor Relations Board v. General Motors Corp., 373 U.S. 734 (1963), which held the agency shop to be valid, and International Association of Machinists v. Street, 367 U.S. 740 (1961), which held the RLA does *not* permit political expenditures by unions contrary to the philosophy of their members. Although the Supreme Court has

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[8]We note that the examination of "governmental action" may be more searching when racial discrimination is at issue. See Black, Foreword: *"State Action", Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 70-71 (1967).

[9]It is of interest that racial discrimination by railway unions against their members was early found violative of an implied duty in the RLA rather than the Constitution. See *e.g.*, Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Vaca v. Sipes, 386 U.S. 171 (1967); but see Mr. Justice Murphy's concurrence in *Steele, supra.*

not examined the NLRB in the context of the constitutionality of union political expenditures, it may be contended that the Court's reasoning in *Street* is applicable by analogy.[10]

Plaintiffs next claim that the UAW has breached its duty of fair representation, thereby invoking the doctrine of Vaca v. Sipes, 386 U.S. 171 (1967), to establish jurisdiction in the federal courts. As the exclusive bargaining representative for the employees here, the UAW does have the statutory duty to represent fairly all employees within the unit. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). Plaintiffs' claim on this theory is couched in terms of a breach of the UAW's "fiduciary duty * * * to use [the plaintiffs' dues] for purposes reasonably necessary and germane to collective bargaining only" and that expenditures for political "doctrines and candidates" opposed by plaintiffs constitutes a violation of that fiduciary duty.[11] A related jurisdictional claim of plaintiffs depends on finding a similar implied duty of fair representation in the collective bargaining agreement, thereby making possible a suit under § 301 of the Labor-Management Relations Act.[12] Again, the Ninth Circuit suggests that such an allegation is sufficient to invoke federal court jurisdiction. *Seay, supra,* at 1000-1001. Plaintiffs have cited no

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[10]But compare Wellington, *supra,* n. 5 at 263-264.

[11]*Cf. International Association of Machinists v. Street, supra,* at 764. "* * * § 2, Eleventh [of the RLA] contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes."

[12]29 U.S.C. § 185(a): "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties. * * *" See *Vaca v. Sipes, supra,* at 183-4.

other cases where a union was held to violate its duty of fair representation by its actions regarding an employee with respect to internal union matters as contrasted with its actions vis-a-vis the employer. In cases such as Brady v. Trans World Airlines, Inc., 401 F2 87 (3 Cir. 1968), and Cunningham v. Erie R. Co., 266 F2 411 (2 Cir. 1959), both cited by appellants, the employee had been dismissed by the employer upon the union's complaint for failure to pay dues. Yet, the plaintiffs here do allege that the UAW will cause McDonnell Douglas to discharge them if they do not pay the contractually required agency fees. Such allegation appears sufficient as a basis for denying a motion to dismiss a complaint seeking the declaratory judgment relief requested by the employees. On the present state of the record, we can do no more than conclude that jurisdiction of the District Court conceivably does exist under these theories to hear the claim of the employees against the union.[13]

In the District Court, the UAW raised the defense of failure of the plaintiffs to exhaust either the available internal union remedies[14] or the grievance procedures established under the contract.[15] However, we cannot make any judgment with respect to this issue since it involves factual questions which the District Court has

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[13]We do not mean to intimate that the plaintiffs have asserted a meritorious claim but only that enough has been alleged to support a decision that jurisdiction exists. Among other requirements, the plaintiffs must show the "union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith" in order to establish a breach of the duty of fair representation. *Vaca v. Sipes, supra,* at 190.

[14]*See e.g.*, Foy v. Norfold & Western Ry., 377 F2 243, 246 (4 Cir. 1967); Brady v. Trans World Airlines, Inc., 401 F2 87, 104 (3 Cir. 1968).

[15]See *Vaca v. Sipes, supra,* at 184; *Federal Protection of Individual Rights under Labor Contracts,* 73 Yale L.J. 1215, 1226-1232 (1964).

not resolved. In addition, the UAW suggested in the District Court that the case may be moot because the union has adopted internal machinery whereby dissident members or persons compelled to pay agency fees may secure a pro rata refund of dues spent for political purposes with which they disagree. This issue also presents controverted questions of fact—for example, whether plaintiffs as non-union members, are entitled to use the UAW's claim procedures to secure rebates—which we cannot resolve on this appeal. In addition, there is a question whether the text of the UAW's refund provision in its constitution is properly before this Court since the provision was merely attached to UAW's suggestion to the District Court to dismiss the action as moot.

The District Court dismissed the complaint against McDonnell Douglas for failure to state a claim for which relief may be granted. Plaintiffs allege McDonnell Douglas will fire them if they fail to pay the agency fees.[16] McDonnell Douglas replies that the Supreme Court has made clear in International Association of Machinists v. Street, 367 U.S. 740 (1961) and Brotherhood of Railway Clerks v. Allen, 373 U.S. 113 (1963) that the possible violation of employees' rights is caused by the expenditure by the union, not the collection by the company, of dues paid under union security agreements. In *Street* the Court stated:

> "* * * the union-shop agreement itself is not unlawful * * * The appellees therefore remain obliged, as a condition of continued employment, to

[16]Plaintiffs' specific allegation is that they "have been advised by responsible representatives of McDonnell Douglas and UAW that should they fail or refuse to pay said monthly agency fee to the UAW their employment will be terminated."

> make the payments to their respective unions called for by the agreement * * * [A]ppellees' grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the Union shop agreement by the mere collection of funds * * * We think that an injunction restraining enforcement of the union-shop agreement is therefore plainly not a remedy appropriate to the violation of the Act's restrictions on expenditures." 367 U.S. at 771.

But in *Allen,* while reiterating the above language, the Court expended the appropriate remedies available to the dissenters to include not only an injunction against the union prohibiting the expenditure for objectionable purposes of that pro rata portion of total union political expense as is derived from dissenting employees, or a pro rata refund from the union of funds spent for objectionable purposes, but also "a reduction of future such exactions [from dissenting employees] by the same proportion." 373 U.S. at 122. Although it is conceivable that the effectuation of the last alternative might require some injunctive relief against McDonnell Douglas, this possibility appears to be too remote to justify the reversal of the dismissal against McDonnell Douglas. The gravamen of the employees' complaint pertains to the conduct of UAW. Although an employer may sometimes be required to look behind the union's claim that an employee has failed to tender the requisite dues, Brady v. Trans World Airlines, Inc., 401 F2 87, 99-101 k(3 Cir. 1968); James v. Marinship Corp., 25 Cal.2 721, 155 P2 329 (1944), such situation is not contemplated by the complaint as it now stands.

Accordingly, the judgment of the District Court will be reversed as to the dismissal of UAW and affirmed as to the dismissal of McDonnell Douglas, in conformity with his opinion.

Reporter's Transcript of Proceedings, Had on January 26, 1970, on Defendants' Motion to Dismiss.

In the United States District Court for the Northern District of Oklahoma.

THE COURT: Well, Mr. Gibson, this is just argument now. I have already passed on that in my mind. I have already prepared and I have an answer to that and I will give it in the order of the Court now.

The Court has carefully studied and perused the entire file in this matter and the extensive briefs filed by the parties. The Court finds that the basic issues before it in the instant litigation, raised by the Motions to Dismiss filed herein, are as follows:

(1). Failure to state a claim upon which relief can be granted;

(2). That this Court lacks jurisdiction of the subject matter, the exclusive jursdiction having been preempted and residing with the National Labor Relations Board;

(3). That the plaintiffs have failed to state a claim upon which relief can be granted in a class action; and

(4). That Title 29, U.S.C.A., 185, does not confer jurisdiction on this Court because this action is not a suit for contract violations as set forth in that title.

The Court also considered 28, 1337, as heretofore has been noted.

The plaintiffs' litigation is premised on the theory that their constitutional rights have been violated due to a purported use by the defendant union of fees collected pursuant to the agency shop provision in Title 29, U.S.C.A., 158, and the union security clause contained in the contract between the defendant company and defendant union. The purported use complained of encompasses the allegation that the union has used such funds to support political campaigns and political candidates. The only manner in which the defendant employer can be connected is that it was a party to the contract involved herein and that the company is authorized by said contract to enforce the conditions and provisions contained in the union security clause for the collection of agency fees. Further the Court finds that said company is required to terminate any employee who does not pay the agency fees so required.

At the outset the Court states that to confer jurisdiction on the Courts to adjudicate union conduct by the constitution would invest the Federal judiciary with the authority to sit in judgment on all union activity, would force the National Labor Relations Board to abdicate their role of policy maker of labor-management relations; and in addition would force the National Labor Relations Board, an expertise in the field of construction of the National Labor Act, into a situation of ignominy. This was not the intent of Congress in enacting legislation and this is not the intent of the Court that it shall be given such interpretation.

There is no doubt in this Court's mind that labor unions are private organizations. To hold otherwise would require this Court to find the governmental action interspersed with the union, and this Court will not so find.

Further, this Court feels that plaintiffs can find little comfort in cases cited to this Court involving the Railway Labor Act. That particular act establishes no unfair labor practices redressable by administrative action.

After reading the briefs submitted by the parties, this Court does not feel that it must go into a long history of the preemption theory, its application, and the exceptions. They are well known to counsel and to this Court.

The statutory authorization for the agency shop as a form of union security is found in 8(a)(3) of the National Labor Relations Act, 29 U.S.C.A. 158. Plaintiffs' claim arises out of the enforcement of this agency shop proviso in the collective bargaining agreement which is governed by the National Labor Relations Act.

To save all parties some time the Court will adopt, by reference, the following opinions:

(1). Heineman versus Douglas Aircraft Company. 211 Federal Supplement, 76.

(2). Seay versus McDonell Douglas, U.S.D.C., Central Division of California, Number 67-1394-HP, filed in that Court on May 27, 1968.

The Court makes the following findings and conclusions:

(1). The Court finds that juridiction is not conferred on this Court by virtue of 29 U.S.C.A. 185. The Court concludes it cannot treat this action as a suit for violation of contract. The Court feels that the substance of this action is intended to prevent the defendant union from using funds collected pursuant to the agency shop agreement to promote or aid political cam-

paigns, political candidates and political idology and beliefs.

(2). The Court further concludes that the only breach alleged by plaintiffs with reference to the defendant union is a breach of fiduciary duty, that is to use the compulsory agency fee payments for purposes germane to collective bargaining. This is, in fact, an allegation of an unfair labor practice.

(3). The Court further finds that the defendant company is only implicated to the extent that it is authorized by the contract to enforce the conditions and provisions contained therein and in the union security clause; and that said company is required to terminate any employee who does not pay the agency fee required by the contract.

(4). The Court concludes the preemption doctrine obtains, and exclusive jurisdiction is with the N.L.R.B.

(5). The Court finds that the plaintiffs attempt to state a cause of action against said McDonnell, defendant company, by the showing of collusion, but there is nothing in the complaint to show that the company bargained with the union in any manner, as to said contract, other than in the normal accepted practice. There is no showing that the defendant company entered into agreements with the union as to how fees collected were to be disbursed by the union.

In conclusion, the Court finds that the defendants' Motion to Dismiss should be sustained, and, therefore, this cause of action and complaint herein are hereby dismissed for the reasons above stated.

Having disposed of this matter the Court finds that there is no necessity for this Court to delve into the propriety of the class action issue.

It is so ordered, and Mr. Hays and Mr. Ungerman shall prepare the findings and conclusions within ten days in conformity with the findings and conclusions announced by this Court.

And, I will remind the attorneys that in the body of such order to use the term, "dismissed this cause of action," because some attorneys fail to put that in and that is not a final order unless it is so used.

That's the order of this Court.

(PROCEEDINGS CLOSED)

Order Entered by District Court.

In the United States District Court for the Northern District of Oklahoma, February 24, 1970.

The Motions To Dismiss of both defendants duly served and filed herein having come on to be heard on the 26th day of January, 1970, the plaintiff appearing by their counsel, Mr. E. J. Eagleton and Mr. Jonathan C. Gibson and the defendant McDonnell Douglas Corporation appearing by its attorney, Mr. Jack N. Hays and the defendant International Union United Automobile Aerospace and Agricultural Implement Workers of America, District Lodge 1093 appearing by Mr. Stephen I. Schlossberg and Mr. Maynard I. Ungerman, their respective attorneys, and the Court being advised in the premises makes the following findings and conclusions:

I

The Court finds that jurisdiction is not conferred on this Court by virtue of Title 29 U.S.C.A. 185 and that the Court cannot treat this action as a suit for violation of contract.

II

The Court further concludes that the only allegation with reference to the defendant union is an alleged breach of fiduciary duty which is an allegation of an unfair labor practice.

III

The Court concludes that the pre-exemption doctrine creates exclusive jurisdiction with the National Labor Relations Board.

IV

The Court finds that the defendant McDonnell Douglas Corporation is only implicated to the extent that it

is authorized by the contract to enforce the conditions and provisions contained therein and in the Union Security Clause; and that said company is required to terminate any employee who does not pay the agency fee required by the contract. That the plaintiff attempts to state a cause of action against said defendant company by the showing of collusion, but there is nothing in the complaint to show that the company bargained with the Union in any manner, as to said contract, other than in the normal accepted practice. There is no showing that the defendant company entered into any agreements with the Union as to how fees collected were to be disbursed by the Union.

ORDERED that the Motion be granted and judgment entered dismissing this cause of action of plaintiffs as against both these defendants.

DATED this 24th day of February, 1970.

ALLEN A. BARROW
JUDGE

APPROVED AS TO FORM:
Mr. E. J. Eagleton and Mr. Jonathan C. Gibson
By
Attorneys for Plaintiff
/s/ Jack N. Hays
Mr. Jack N. Hays
Attorney for Defendant
McDonnell Douglas Corporation
Mr. Stephen I. Schlossberg and Mr. Maynard I. Ungerman
/s/ By (illegible)
Attorneys for Defendant
International Union United Automobile
Aerospace and Agricultural Implement
Workers of America, District Lodge 1093